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Liability for Defective Immovable Property: The *Hammock* Case in a Comparative Perspective

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Abstract: Can joint owners of a defective property – or an immovable object thereon – hold each other non-contractually liable for injuries suffered as a result of the defect? This is a question that has substantial societal effects and requires a somewhat legal-political solution. In 2010, the Dutch Supreme Court (*Hoge Raad*) faced this exact dilemma in the *Hammock* case.[1] Aside from examining that specific decision, this comparative law project ascertains how such a case would be resolved in six other European jurisdictions – Germany, France, Belgium, Italy, England, and Ireland. Is the solution reached in common law jurisdictions different than that in civil law jurisdictions? Or do completely divergent outcomes arise within similar legal systems? Will the outcome be different if the relevant rules are strict-based liability as opposed to fault-based liability? By contributing to this rather under-explored area of non-contractual liability law, this project sheds a welcome light on these questions. In doing so, it becomes evident that any legal-political solution to the *Hammock* scenario would entail ample debate among relevant academics and practitioners.

Résumé: La responsabilité délictuelle de biens immeubles défectueux: 'l'affaire du hamac' en perspective du droit comparé Les copropriétaires d'un bien défectueux – ou d'un objet immeuble qui se trouve sur ce bien – peuvent-ils être tenus responsables réciproquement des préjudices subis à cause de ce défaut? Il s'agit d'une question qui a des conséquences considérables et qui demande une réponse juridico-politique. En 2010, la Cour de Cassation néerlandaise (*Hoge Raad*) s'est trouvée prise dans ce dilemme précis dans 'l'affaire du hamac'.[2] Outre l'examination de cette décision spécifique, ce projet de droit comparé a pour but de découvrir comment une telle affaire serait traitée dans six autres juridictions européennes – l'Allemagne, la France, la Belgique, l'Italie, l'Angleterre et l'Irlande. Les solutions trouvées dans les juridictions de droit commun, sont-elles différentes de celles trouvées dans les juridictions de droit civil? Ou émergent-ils des résultats tout a fait divergents au sein

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1 Hoge Raad HR, 8 Oct. 2010, LJN BM 6095, *NJ* 2011, 465 with a note by T. HARTLIEF, also published in *JA* 2011, 10 *et seq.* with a note by H.E. BAST and in *RAV* 2011, 5 *et seq.* with a note by M.B.F. VALK.

2 Arrêt du Hoge Raad du 8 Oct. 2010, ECLI:NL:HR:2010:BM6095, publié dans *NJ* 2011, 465 avec un commentaire de T. HARTLIEF, également publié dans *JA* 2011, 10 et suiv. avec un commentaire de H.E. BAST, et dans *RAV* 2011, 5 et suiv. avec un commentaire de M.B.F. VALK.

des systèmes juridiques assimilés? Le résultat, sera-t-il différent si les règles de droit applicables partent d'une responsabilité civile objective que s'ils partent d'une responsabilité pour faute? En contribuant à ce domaine plutôt méconnu du droit de responsabilité non-contractuelle, ce projet jette une lumière nouvelle sur ces questions. Ainsi, il devient évident que toute solution juridico-politique au 'scénario du hamac' entraînerait des déliberations considérables parmi les chercheurs et les praticiens impliqués.

Zusammenfassung: Können Miteigentümer eines fehlerhaften Grundstücks oder einer damit verbundenen, fehlerhaften Sache einander außervertraglich haftbar machen für Schäden, die die Miteigentümer auf Grund des Defekts erleiden? Diese Frage hat erhebliche gesellschaftliche Relevanz und erfordert eine rechtspolitische Lösung. Im Jahre 2010 sah sich das oberste niederländische Gericht (*Hoge Raad*) mit dieser Frage im Hängemattenfall konfrontiert. Dieses rechtsvergleichende Projekt geht über die Analyse der Entscheidung des obersten Gerichts der Niederlande in dieser Sache hinaus. Es wird auch untersucht, wie ein solcher Fall in sechs anderen europäischen Rechtsordnungen, nämlich den Rechtsordnungen Deutschlands, Frankreichs, Belgiens, Italiens, Englands und Irlands, gelöst würde. Ist die Lösung, die in *common law* Rechtsordnungen gefunden wird, anders als die Lösung in *civil law* Jurisdiktionen? Oder werden vollständig unterschiedliche Ergebnisse in ähnlichen Rechtsordnungen erreicht? Hängt das Ergebnis auch davon ab, ob die Haftung auf Verschulden oder auf Gefährdung basiert wird? Dieses Projekt sucht, diese Fragen zu beantworten, und trägt damit zur Erkundung dieses noch großenteils unerforschten Teilgebiets des außervertraglichen Haftungsrechts bei. Während dieser Erkundung wird deutlich, dass jedwede rechtspolitische Lösung des Hängemattenszenarios eine langwierige und umfangreiche Diskussion unter Wissenschaftlern und Praktikern mit sich brächte.

In October 2010, the Dutch Supreme Court (*Hoge Raad*) issued a judgment[3] that sparked an intense debate among private lawyers. The judgment is known as the *Hammock* case, since it deals with civil liability for the bodily injury suffered by a woman who was lying in a hammock hanging on a brick pillar, which suddenly collapsed on top of her.

The facts of the case were given as follows: A couple decided to hang a hammock on a brick pillar (usually used as a stop for a large wooden gate). On 13 July 2005, while the girlfriend was lying in the hammock, the pillar collapsed on her body causing serious spinal injuries. She was left wheelchair bound and dependent on others for life. Both the boyfriend and the girlfriend co-owned the premises upon which the pillar was built. The pillar in question was already on the premises when they became co-owners and had been subjected to wear and tear from weather conditions and also from the impact of opening and closing the heavy gate. Although it was reinforced with 1.2-meter angled irons, the pillar was

3 HR, 8 Oct. 2010, LJN BM 6095, *NJ* 2011, 465 with a comment by T. HARTLIEF, also published in *JA* 2011, 10 *et seq.* with a note by H.E. BAST and in *RAV* 2011, 5 *et seq.* with a note by M.B.F. VALK.

not filled in with concrete but was hollow and full of loose debris. The parties were joint holders of third-party liability insurance. Subsequently, the girlfriend brought a claim against her boyfriend[4] (as co-owner of the defective property) and their insurance company. This created a somewhat abstruse scenario, whereby the plaintiff, a first-party to the insurance contract, was seeking a claim against a policy (under which she was 50% liable) that normally protects adversely affected third parties.

This raised the following question before the Dutch courts: Can joint owners of a defective property (or an immovable object thereon) hold each other non-contractually liable for injuries suffered as a result of the defect? Or can damages in such cases only be awarded to injured third parties who are not co-owners of the property? Both the competent Court of First Instance (*the Rechtbank 's- Hertogenbosch*)[5] and the Dutch Supreme Court[6] ruled in favour of the woman and upheld her claim, finding the woman's boyfriend – and subsequently the insurance company – liable. Arguably, not strictly juridical reasons, but reasons of social justice were decisive here. The courts implicitly deemed it a just solution that a woman, who will sit in a wheelchair for the rest of her life because of an injury that was not her fault, receives compensation from her insurance company.

The liveliness of the debate sparked by this case in The Netherlands made us curious to know how our colleagues from other European countries would deal with it. How would courts and scholars from other European jurisdictions answer the core question brought before the Dutch courts in the *Hammock* case?

Our curiosity gave birth to the comparative law project from which the present collection of papers has arisen. Initially, we commented on the *Hammock* case from the perspective of Dutch law (Oldenhuis) and Irish law (McCann). Then, we asked experts in liability law from Belgium, England, France, Germany, and Italy to comment on the same case and report how it would be dealt with in their jurisdictions. Finally, we performed a comparative analysis of the national reports and achieved our conclusions.

The present introductory remarks will be followed, first of all, by Fokko Oldenhuis' comment on the *Hammock* case from a Dutch law perspective. The second, third, fourth, fifth, sixth, and seventh papers will consist of the comments by Christine Godt from a German law perspective, Hugues Kenfack from a French

4 The couple got married just two months after the accident, so at the time of suit he was actually her husband.

5 *Rechtbank 's- Hertogenbosch*, judgment of 21 Jan. 2009, LJN BH0728, *NJF* 2009, 105, *JA* 2009, 52.

6 HR, 8 Oct. 2010, *supra* n. 1.

law perspective, Aloïs van Oevelen from a Belgian law perspective, Giovanni Comandé and Luca Nocco from an Italian law perspective, Francesco Giglio from an English law perspective, and Adam McCann from an Irish law perspective. Our brief comparative analysis will conclude this collection of paper.